

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KAUFMANN'S, A DIVISION OF THE
MAY DEPARTMENT STORES COMPANY¹

Employer

and

Case No. 8-RC-15844

THE UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

¹ The Employer's name appears as amended at hearing.

² The parties filed briefs which were duly considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees including stock and processing associates, bulk processing employees, flat goods processing, housekeeping, import processing, OTH processing, maintenance, material handling, receiving, RTV, tabletop, ticket room, transfer, G0H processing, shortage control, big ticket, unit control, phone board, customer service, furniture workroom clerical, big ticket receiving clerk, accounts payable and traffic employees, but excluding carpet workroom employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

There are approximately 536 employees in the unit found to be appropriate. The Employer operates a large distribution center near Lordstown, Ohio the only facility involved herein.

The Petitioner seeks to represent a unit of all full-time and regular part-time stock associates, ticket room, table top and shortage control employees, excluding part-time flex employees, contingent employees; unit control, phone board, customer service, accounts payable and traffic employees; carpet workman, big ticket receiving clerk, furniture repair clerical, office clerical employees, confidential employees, guards, managerial employees and supervisors as defined in the Act.

The Employer essentially proposes a wall-to-wall unit and argues that the Petitioner's position regarding the part-time flex employees and contingent employees would exclude 216 employees who worked in excess of 77,000 and 45,000 hours, respectively, in the final 27 weeks of calendar year 1998. The Employer argues these employees perform the same duties as the full

and part-time employees sought by the Petitioner. In addition, the Employer argues for the inclusion of 65 clerical employees whose jobs are integral to the operation of the warehouse and who have significant contact with employees sought by the Petitioner.

The only employees at issue in this proceeding are part-time flex and contingent employees, unit control clericals, the phone board clerical, customer service employees, furniture work room clericals, big ticket receiving clericals, accounts payable clericals and traffic office employees.

The merchandise handled at the Employer's facility falls into two categories. One category, "big ticket merchandise", includes furniture, mattresses, box springs, and large screen televisions. The other category includes garments, cosmetics, housewares and other merchandise small enough to be hand carried by the Employer's customers. Big ticket merchandise is stored at the east end of the facility and thereafter delivered by an independent contractor to retail customers' homes. Merchandise other than big ticket items is processed on the west half of the distribution center. Such merchandise is not warehoused, rather it is received from vendors, processed and delivered to the Employer's stores. The department handling this segment of the distribution process is referred to as central processing. Warehousemen are called stock associates in the big ticket department, and processing associates in central processing. Finally, the distribution center also processes merchandise returned from the Employer's retail stores to vendors. This merchandise is stored at the facility until shipment back to respective vendors.

PART-TIME FLEX AND CONTINGENT EMPLOYEES

The parties are in agreement as to the inclusion of the Employer's part-time base employees. These employees are guaranteed 24 hours each week. On the other hand, the part-

time flex and the contingent employees, whom the Petitioner seeks to exclude, work during monthly “open-to-buy” periods. When they are called in, the part-time flex employees and contingent employees generally work an eight-hour shift, like their full-time and part-time base counterparts. The testimony characterized the length of the open-to-buy period as the better part of two weeks. The open-to-buy period is triggered by the Employer’s purchases following its monthly release of funds for such purpose and thus the timing varies each month. In order to expedite the processing of this substantial influx of goods, the Employer calls in the part-time flex and contingent employees. The record reveals that virtually all of these employees work in central processing, and not in big ticket merchandise.

The Employer’s witnesses, Human Resource Vice-President Deborah McCallister and Director of Central Processing, Alan Hanley, testified that during the open-to-buy periods, part-time flex and contingent employees outnumber corresponding full-time and part-time base employees. McCallister indicated that contingent employees generally worked only during open-to-buy periods, whereas some part-time flex employees work at other times. At the time of the hearing, there were 106 part-time flex employees and 110 contingent employees. McCallister and Hanley further testified that these employees performed the same duties and worked side by side under the same supervision as part-time base and full-time employees. Additionally, McCallister testified that both the part-time base and contingent employees are a stable workforce, with little turnover. While the Employer did provide a week by week breakdown of total hours worked by contingent employees as a group between October 13, 1998 and January 23, 1999, it did not do likewise with the part-time flex employees. There was no documentary evidence demonstrating that the same individuals consistently worked as either part-time flex or contingent employees during these open-to-buy periods. There was no

evidence presented, such as work schedules, which would establish which positions were held by these part-time flex or contingent employees. In addition, the record is silent as to whether these employees regularly worked in specific departments or classifications, or whether their assignments varied during each open-to-buy period. The weekly breakdown did demonstrate that use of contingent employees was significantly reduced in the months of December and January, as compared to the preceding weeks. There were no records presented evidencing the weekly hours worked by contingent employees during other periods.

Part-time flex employees receive the same benefits as their full-time or part-time base counterparts, except part-time flex and part-time base employees' vacation benefits are prorated. On the other hand, contingent employees receive no benefits, with the exception of an employee discount on purchases. While full-time, part-time base and part-time flex employees with the same seniority date and same job would be paid at the same hourly rate, comparable contingent employees would receive 20¢/hour less. All employees are subject to the same handbook, record their hours in the same fashion, utilize the same cafeteria and enjoy the Employer's promotion from within policy. Available jobs are posted and part-time flex and contingent employees are eligible to bid on open positions. Job openings are also published in the Employer's weekly newsletter and on its telephone information line. The record reveals that 261 current regular employees of the distribution center were formerly contingent employees.

Hanley testified that the Employer determines the level of part-time flex and contingent employees needed by each specific processing area. These areas utilize either six-month or monthly plans projecting the number of cartons the area anticipates it will receive. A formula is set up which allows the Employer to calculate the number of hours needed in each processing area. Part-time flex and contingent employees would be allocated based on these projections.

Part-time flex and contingent employees are notified of their schedules for the next open-to-buy period either in person on their last day, or by coming into the distribution center to check the schedule, or by calling the Employer's information line. In the event a part-time flex or contingent employee fails to show up as expected at the open-to-buy period, Central Processing notifies the Human Resource Department which in turn telephones the part-time flex or contingent employee.

The evidence above demonstrates that the part-time flex employees and the contingent employees perform the same work as their full-time and part-time base counterparts and are under the same supervision. Part-time flex and part-time base employees receive the same benefits as full-time employees, however, their vacation pay is calculated differently. Vacation hours for both part-time flex and part-time base employees is determined by their average work week. Contingent employees receive no benefits, other than an employee discount. In addition, the record reveals at the time of the hearing, 261 of the distribution center's current employees were previously contingent employees.

Two factors considered by the Board in making its determinations with respect to whether on-call employees should be included in a bargaining unit are whether these employees perform bargaining unit work and whether the employees' work schedules demonstrate a regularity of employment. In *Davison-Paxon Company*, 185 NLRB 21 at 23-24 (1970), the Board held that, "any contingent or extra employee who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit. . ."

In *Saratoga County Chapter NSYARC, Inc.*, 314 NLRB 609 (1994), the Board again applied the *Davison-Paxon* eligibility formula despite the hearing officer's ruling which held

that under the circumstances of the case, a modification of the formula was necessary. The Board, in disagreement with the hearing officer, found no showing of special circumstances which would warrant the utilization of a different formula.

The Employer argues the hours of contingent employees would be understated by limiting the eligibility period to a quarter which includes December 1998 and January 1999. The record reveals that the Employer makes extensive purchases in preparation for the Christmas season. The Employer argues by the first week of December, the Christmas inventory has been processed and shipped to its numerous retail stores. Finally, the Employer argues that its purchases are dramatically reduced in December and January, when stores are engaged in the reduction of Christmas merchandise. The Employer notes during the months of December and January its use of contingent employees is substantially reduced. In support of this argument, the Employer provided the above-noted total number of contingent employees used per week between October 31, 1998 and January 23, 1999. Clearly, during this period, a maximum of 107 contingent employees were used the weeks ending November 14 and November 21, 1998. During the week ending December 12, 1998 that number was reduced to 41 and fell lower until rising again the week ending January 23, 1999.

The Employer contends that in order to determine eligibility in this case a modified formula should be applied. In this connection, the Employer argues that any part-time flex or contingent employee who averaged four or more hours per week during either of the two 13-week periods prior to the eligibility date should be entitled to vote. In support of its position, the Employer relies on several cases where a modified eligibility formula was applied. I find these cases distinguishable. In *C.T.L. Testing, Inc.*, 150 NLRB 982 (1965) which concerned the eligibility of part-time concrete inspectors, the Board applied a formula specifically gauged to fit

the seasonable aspect of the construction industry. Unlike the instant case, the record before the Board in **C.T.L. Testing Laboratories, Inc.** included detailed evidence of individual inspector's employment history with the employer during various periods. In **Daniel Ornamental Iron Co., 195 NLRB 334 (1972)**, also relied on by the Employer, the Board considered the seasonable nature of the Employer's business of ornamental iron fabrication to fashion a formula conferring eligibility on employees who worked a minimum of 15 days in either of the two quarters immediately preceding the eligibility date.

The evidence in this record does not include a breakdown regarding the use of contingent employees in weeks outside the period between October 31, 1998 and January 23, 1999 nor does it contain any corresponding information for part-time flex employees. I note the Board in **Davison-Paxon** applied with approval the formula previously used in **The May Department Stores Company, 175 NLRB 513 (1969)**, and **Allied Stores of Ohio, Inc., 175 NLRB 966 (1969)**, two cases involving the eligibility of on-call employees in the retail department store industry. I have found no evidence in the record to require the application of a formula other than the longstanding **Davison-Paxon** formula. Accordingly, I find that the **Davison-Paxon** formula applies here. See also **Saratoga County NSYARD, Inc., supra**, and **Trump Taj Mahal Casino, 306 NLRB 294 (1992)**. Accordingly, any contingent or part-time flex employee who averages four hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit.

DISPUTED “BIG TICKET” CLERICAL POSITIONS³

The Petitioner seeks the exclusion of the following “big ticket” clerical positions from the unit: unit control clericals; phone board clericals; customer service clericals; furniture workroom clericals; and receiving clerical. The Employer contends that all of the above-noted positions should be included in the unit. Unit control clericals initiate the order filling process in the big ticket department by the creation of a pick tag. Once created by the unit control clerical, the pick tag provides the stock associates in big ticket with the item’s delivery date, its location in the warehouse, as well as miscellaneous instructions such as the need to provide fabric protection for the item. These pick tags, along with their sales checks, are delivered by the unit control clericals to the Delivery Office. The Delivery Office generates delivery manifests which are turned over to a unit control clerical, located adjacent to the docks. This employee sorts the pick tags by aisle location and hand delivers them to the checkpoint associates. Here, pick tags are distributed to stock associates who pick the big ticket merchandise from the warehouse storage racks.

The unit control clericals have regular work related interaction with the big ticket stock associates. The record reveals that checkpoint stock associates in the big ticket area frequently interact with unit control clericals by telephone or in person, either on the warehouse floor, or at the Unit Control Office in order to keep abreast of their anticipated workload. During these contacts, the checkpoint associates, in an effort to prevent the extension of their workday, often urge unit control clericals to speed up the generation of pick tags. Other contact between stock associates and unit control clericals occur when problems arise in executing a pick tag, for

³ The parties stipulated to the inclusion of 37 clerical employees who work in the ticket room. These employees create dock receipts for imported non-big ticket merchandise arriving at the receiving dock, initiate the processing

example, when there is an incorrect location. Further contact between stock associates and unit control clericals occurs during semi-annual inventory periods when 8 of the 11 unit control clericals team up with stock associates.

The record also reveals contact between the three remaining unit control clericals and big ticket stock associates. First, another unit control clerical audits the deliveries of big ticket merchandise, collecting delivery manifests evidencing customer signatures. When these documents are delayed or incomplete, this unit control clerical regularly communicates with stock associates. “Locker stock” is bedding which is on consignment. A locker stock associate regularly delivers locker stock paperwork to a unit control clerical. Problems with locker stock such as goods damaged in transit or inventory discrepancies prompt regular contact between the stock associates and unit control clericals. “Quick turn” bedding includes mattresses and box springs delivered by vendors to the distribution center on a “just-in-time” basis for delivery to the retail customer. Contact between unit clericals and stock associates occur on a regular basis in such situations as the receipt of a short shipment. In this circumstance, bedding receivers would contact the unit control clerical handling quick turn bedding in order to find a replacement for the customer.

While 10 of the 11 unit control clericals share space with the customer service and phone board clericals on the east side of the office, one unit control customer pick-up clerical works in the customer pick-up area next to the delivery docks. She generates pick tags when customers arrive at the dock to pick up big ticket items. After the pick tag is created, this unit control clerical pages a big ticket stock associate who retrieves the item and delivers it to the designated

of merchandise by the creation of tickets and have regular work related contact with warehouse employees. On the basis I shall accept the parties’ stipulation and include these employees in the unit.

dock. This unit control clerical also routinely interacts with return room stock associates in the event a customer cancels an order.

Phone board clericals play an integral part in the Employer's policy of guaranteeing 24-hour delivery of furniture and bedding to customers within certain zip codes. The record reveals that about 20% of the big ticket deliveries involve guaranteed 24-hour delivery. Ten clericals within this disputed classification initiate the order filling process for 24-hour delivery merchandise when the sale is at a retail store after 4:00 p.m. If a sale occurs before 4:00 p.m., Monday through Friday, the unit control clericals generate the pick tags, however, transactions occurring after 4:00 p.m. Monday through Friday or on weekends result in a pick-tag being generated by a phone board clerical. Night shift stock associates regularly enter the phone board area to collect pick tags generated for these 24 hour deliveries. Outside of order filling, phone board clericals confer with customers on subjects such as delivery dates and damaged or incorrect goods. Phone board clericals have regular contact with check point stock associates when difficulties arise executing a pick tag.

The 11 customer service clericals are responsible for monitoring merchandise that is returned by customers and insuring that replacement merchandise is redelivered. In the course of their duties, customer service clericals have contact with stock associates in circumstances including the joint inspection of an item returned as damaged, questions concerning incomplete or missing paperwork and contact with return room stock associates relative to the issuance of customer credits.

The two furniture workroom clericals are located in the furniture workroom next to the customer pick-up area. One of the two furniture workroom clericals regularly rides with stock associates on a lift to identify and tag furniture items which will be shipped from the distribution

center to the vendor. In addition, in circumstances where an item needs to be repaired, rather than returned to its vendor, the furniture workroom clerical will pick up necessary repair parts at the UPS receiving dock, often receiving assistance in locating repair part deliveries from the UPS stock associates. Finally, the two furniture workroom clericals fill in as needed for the unit control customer pick-up clerical.

The receiving clerical is located on the big ticket receiving dock. This big ticket receiving clerical is responsible for affixing I.D. tags on the 500-1,000 big ticket items received daily on the receiving dock. After generating the I.D. tag, this employee hands the tag to the receiving stock associate who places the tag on the merchandise. When the receiving clerical is absent, the two furniture workroom clericals fill in for her.

Despite the Petitioner's objection to the inclusion of the aforementioned big ticket clerical classifications, I note that in cases involving warehouse employees, the Board has found that warehouse clericals should be included in a warehouse unit in cases where the duties of the warehouse clericals are integral to the functioning of the warehouse unit. ***John N. Hansen Co., 293 NLRB 63, 64-65 (1989); S & S Parts Distributors Warehouse, 277 NLRB 1293 (1985);*** See also ***Fleming Foods, 313 NLRB 948 at 949 (1994).***

In the instant case, all of the employees in the big ticket classification noted-above perform duties integral to the movement of the big ticket merchandise to, about and from the distribution center. In this regard unit control and phone board clericals initiate the order filling process in the big ticket area by the creation of pick tags. Despite the fact that the big ticket clericals spend the bulk of their day in an office, there is frequent in person contact and telephone contact among the employees in various big ticket clerical classifications and the stock

associates concerning inventory location discrepancies, inventory audits, and various problems with paperwork.

The approximately 35 big ticket clerical employees sought to be excluded by the Petitioner in the above-noted classifications of unit control, phone board, customer service, furniture workroom clericals and receiving clerical share a community of interest with the big ticket stock associates and demonstrate job functions and working conditions indistinguishable from the 37 ticket room clericals which the parties have agreed to include.

Big ticket clerical positions are posted for bid in the same manner as ticket room clerical vacancies. The record demonstrates that fourteen of the big ticket clericals previously held stock associate positions. Big ticket clericals, like ticket room clericals, and big ticket stock associates make entries into and obtain information from the Employer's computerized information system. Big ticket clericals are paid hourly at the same pay level as big ticket stock associates, with the exception of checkpoint associates. Like their ticket room counterparts, big ticket clericals must have an understanding of how the respective stock associates perform their jobs.

Under these circumstances, I shall include the big ticket clericals in the classification of unit control, phone board, customer service, furniture workroom and receiving clerical in the unit.

ACCOUNTS PAYABLE CLERICALS

The Petitioner also opposes the inclusion of 23 accounts payable clericals who process the payment of vendor invoices and resolve disputes with vendors. The Accounts Payable Office is located on the second floor, next to the Tabletop processing area. Accounts payable clericals have contact with "return to vendor" stock associates when the clericals pick up claim forms in the return to vendor area. The account payable clericals also come in contact with return to

vendor associates whenever an audit reveals a discrepancy in the amount claimed or the absence of the claim number notation on the new dock receipt created by the receiving associate.

Twice daily an accounts payable associate will pick up all dock records generated on the receiving docks by the receiving associates. Accounts payable clericals have frequent contact with the ticket room whenever reconciling short shipments or verifying that merchandise has been released to the retail stores, thus obligating the payment of a vendor's invoice. The big ticket receiving clerk and accounts payable clericals also have work-related contact when reconciling which merchandise was received from vendors. Merchandise returned by the Employer to a vendor must have an authorization number on the label prior to shipment. Return to vendor associates pick up the authorization labels in the Accounts Payable Office. Accounts payable clericals receive training on the warehouse floor including one day in the receiving area, one day in the ticket room and two days in the processing area.

Nineteen of the 23 accounts payable associates are paid at the Level 4 rate which is the rate paid to big ticket stock associates in Checkpoint. The remaining four are paid at the Level 2 rate, which is less than big ticket stock associates. Vacancies in Accounts Payable, like all vacancies at the distribution center are posted for bid by anyone in the distribution center. The record reveals certain employees currently working in Accounts Payable are former processing or stock associates.

In *Avon Products, Inc., 250 NLRB 1479, at 1487 (1980)*, cited by the Employer, the Board overruled the Regional Director's conclusion that employees in the Inventory, Cost and Planning Department, including an accounts payable clerk were office clerical employees and therefore excludable from the unit. The Board held:

“Employees in each of the above classifications share common wages, hours, and working conditions with all other employees

included in the unit. In the course of pursuing their duties they come into repeated daily contact with other unit employees. In addition, although their work does entail primarily paperwork, that is the case with a substantial portion of the employees we have included in the unit. Finally, the jobs performed by these employees, which involve costs, inventories, and profits, relate directly to the order flow process inasmuch as the data compiled provides a foundation for the manner in which the entire order filling process operates. We therefore find that these employees are plant clericals.”

Accordingly, on the basis of the foregoing, I shall include the accounts payable clericals in the unit.

TRAFFIC OFFICE EMPLOYEES

The Petitioner also seeks to exclude the five employees employed in the Traffic Office. The Traffic Office operates to ensure that merchandise moves from vendors to the distribution center as needed and that return to vendor merchandise moves efficiently from the distribution center back to its vendors. The traffic office is located on the second floor across from the tabletop processing area. The record demonstrates significant contact between employees of the traffic office and receiving dock associates, as well as return to vendor associates. Traffic associates perform no manual labor and spend 70% of their time in the traffic office. Their Level 3 wage rate is the same rate paid to big ticket stock associates.

I find the five traffic associates perform duties that are integral to the functioning of the distribution center. Despite the fact that they spend the majority of their time in the office, I find substantial daily contact between the traffic associates and the receiving associates and return to vendor associates. In addition, I find that the traffic associates share a sufficient community of interest with the other employees to be included in the unit.

The parties have stipulated that employees in the following job classifications are included in the unit and eligible to vote: bulk processing, flat goods processing, housekeeping,

import processing, OTH processing, maintenance, material handling, receiving, RTV, table top, ticket room, transfer, GOH processing, shortage control and big ticket. The parties also have stipulated that carpet work room employees are ineligible to vote. Since there is no evidence contrary to the parties' stipulation I shall accept it.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are part-time flex and contingent employees who regularly average 4 or more hours of work per week for the last quarter prior to the eligibility date. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by The United Steelworkers of America.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior**

Underwear Inc., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by **March 19, 1999**.

Dated at Cleveland, Ohio this 5th day of March 1999.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

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